sues, and the court of appeals affirmed in a comprehensive opinion (Pet. App. 2a-14a; 440 F. 2d 1164).

Petitioner was injured on November 5, 1965, while painting inside the port lifeboat of the S.S. EXHIBITOR. The EXHIBITOR was built in 1940, was decommissioned in 1962, and was stored in the Hudson River "mothball" fleet until October 1965 (Pet. App. 19a, 20a, 23a). At that time, the government contracted with the New York Shipbuilding Corporation, petitioner's employer, for the ship's overhaul in preparation for recommissioning; the contract covered 499 specific items at a cost of $440,422 (Pet. App. 19a). One of the items was removal of the lifeboats from the hold, reconditioning them, and restoring them to the launching rigs (*ibid.*).

On the day of the accident, the port lifeboat was temporarily rigged outboard from its launching rig, in a suspended position over the side of the vessel (Pet. App. 20a). Ordinarily, the lifeboat is held in place by two separate sets of wires: the lowering lines, and the so-called "preventer" wires (Pet. App. 21a-23a). Prior to petitioner's entering the boat, the preventer wires had been removed, and were not in place when the accident occurred (Pet. App. 22a).

Petitioner was a painter, and his foreman instructed him to paint the release mechanism inside the port lifeboat (Pet. App. 20a, 22a). That mechanism was designed to disengage the boat's lowering lines simultaneously, in an emergency, so that it could float free in the water after it had been lowered (Pet. App. 20a); it was protected from unintentional use by toggle pins securing it to the boat's floor (Pet. App.

21a). A notice was printed on the shaft that operates the mechanism, just below where the handle joined it, containing this warning: "DANGER LEVER RELEASES HOOKS." There was no warning on the handle itself (Pet. App. 20a; see photograph at Pet. App. 33a).

Petitioner had never before painted in a lifeboat, and received no instructions from his employer before entering it (Pet. App. 20a). He entered the boat as instructed, alone. He then observed dirt on the boat's floor in the area of the release mechanism and sought to clear the area before beginning (Pet. App. 22a). Immediately thereafter, the boat fell 35 to 50 feet from its outboard position to the river below, seriously injuring petitioner (*ibid.*). The release mechanism had been activated and, without the back-up protection of the preventer wires, resulted in the fall. While petitioner had no specific memory of what happened, the district court concluded that "[d]espite the printed warning on the rotating release shaft, [petitioner] activated the release of the lifeboat proximately causing his own injuries" (Pet. App. 24a).

In this Court petitioner argues only the negligence *per se* claim. He contends, as he did in the courts below, that the government was negligent *per se* because it violated applicable regulations in that the warning sign for the lifeboat's release mechanism was not properly located or properly worded. According to him, regulations effective on and after November 19, 1952, required that the warning be placed on the release lever itself, and other regulations effective in July, 1957, required the warning to read, "DANGER—

LEVER DROPS BOAT." See 17 Fed. Reg. 9474; 22 Fed. Reg. 4021; 46 C.F.R. 97.37-37(e).

1. Contrary to petitioner's assertion, this case does not pose a question of general importance, but involves only the interpretation and application of a narrow regulation. The regulation specifically limits its applicability to vessels "contracted for" after November 19, 1952; as to those "contracted for" prior to that date, "existing signs and markings containing the same general intent, but not necessarily identical wording or exact letter type, size, or color, may be retained so long as they are in good condition to the satisfaction of the Officer in Charge, Marine Inspection." 17 Fed. Reg. 9475, 46 C.F.R. 97.37-90(a)(1) (see Pet. App. 26a-27a). Petitioner argues that the amended regulation applies because it defines "contracted for" as including contracts for material repairs (see 17 Fed. Reg. 9443, 46 C.F.R. 90.05-5(a)); that the 1965 restoration of the EXHIBITOR was such a contract; and that the vessel therefore was "contracted for" in 1965.

Both courts below correctly rejected this argument. Since the EXHIBITOR was built in 1940, it was "contracted for" before 1952. Under the regulation the making of material repairs to a vessel also constitutes "contracting" for the vessel and, as the court of appeals held (Pet. App. 7a, n.8), the "more reasonable interpretation" is that the regulation permits flexibility where either construction or repairs were contracted for before 1952. This interpretation accords with the obvious purpose of the regulation to allow continued use of existing signs and markings

that are adequate;[1] indeed, the Officer in Charge of Marine Inspection has express authority to modify or even to omit markings where circumstances permit. 46 C.F.R. 97.37-3(a) (see Pet. App. 8a, n. 10, and 25a). The warning sign on the release mechanism satisfied the requirement of the regulation for pre-1952 vessels, since it contained "the same general intent" of the amended regulation and received the requisite approval by the officer in charge. Thus, the courts below correctly concluded that the warning on the release mechanism was not contrary to the regulation and that its use by the government was not negligent *per se*.

2. At all events, petitioner would not be entitled to any recovery here, even if his construction of the regulation were accepted. The courts below also found that petitioner's injuries did not result from any purported shortcomings concerning the warning sign—and, therefore, that the alleged violation of the regulation was not the proximate cause of his injury.

The district court concluded that both the release mechanism and the warning sign "were adequate for their respective purposes," and that the location of the

---

[1] As a general policy, the government considers that a major or material alteration of a vessel after 1952 would warrant updating its safety features; but "each vessel must be considered on an individual basis as to the degree that 'updating' is feasible, practicable and reasonable." See Navigation and Vessel Inspection Circular No. 12-65, attached as Appendix A. Thus, contrary to petitioner's assertion (Pet. 16), the "uniform mandatory minimum safety standards" are subject to modification depending on circumstances, and the decision below is not in conflict with the intent or purpose of the regulation.

warning on the shaft, rather than on the handle itself, "was not a proximate cause, either in whole or part" of petitioner's injuries (Pet. App. 28a). That court further held that "[t]he proximate cause of [petitioner's] injuries was his own negligence, or his conduct viewed in conjunction with the negligence of the shipyard's employees in removing the safety wire rigs, or the absence of adequate precautionary instructions by shipyard personnel" (*ibid.*).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

APPENDIX A

TREASURY DEPARTMENT
UNITED STATES COAST GUARD

[SEAL]

Address reply to:

COMMANDANT (MMT-4)
U.S. Coast Guard
Washington, D.C. 20226

1 September 1965

NAVIGATION AND VESSEL INSPECTION CIRCULAR
No. 12-65

Subj: Alteration or Modification of Existing Cargo or Tank Vessels; associated safety improvements

1. *Purpose.* To explain the application of 46 CFR 30.01-10 and 46 CFR 90.05-5(a) with regard to certain safety improvements on existing vessels undergoing major alterations.

2. *Background.* From time to time there are proposals to make major alterations to or conversions of all or parts of existing vessels. As contrasted with ordinary service repairs, these proposals may involve replacement or modification of considerable portions of the ship. Jumboizings, extensive renewals, lengthenings, repowerings and conversions for change in service fall into this category. In many cases only a relatively small portion of the completed ship can be identified as existing at the time the work was begun.

3. *Discussion.* As safety standards are revised upward, they are seldom made retroactive, partly on the assumption that with the passage of time existing vessels will be retired from service and only those built

to the newer and higher standard will continue to ply the seas under the American flag. It would also be costly and impractical to require a vessel to satisfy each change in regulations. However, when major alteration programs are carried out, there is a definite intention of extending the service life of existing vessels, and the vessel is necessarily withdrawn from service to accomplish the work. Therefore, it is appropriate, when such substantial changes are contemplated, that careful consideration be given to certain safety details with a view to bringing the vessel into closer compliance with current standards. Each vessel will, of course, have to be considered individually with regard to the extent to which it departs from present day requirements and to the extent it is reasonable and practicable to accomplish such improvements.

4. *Action.* When an existing cargo or tank vessel is to be modernized, jumboized, lengthened or converted to other service, the feasibility of the following improvements in construction standards which contribute materially to safety shall be considered:

(a) Provision of emergency source of power and emergency lighting.
(b) Separation of required fire pumps and their sources of power.
(c) Removal of steam smothering systems and replacement with presently acceptable fixed fire-fighting systems.
(d) Installation of self-closing fire doors in stairways passing through accommodation spaces.
(e) Modification or renewal of the lifesaving equipment as necessitated by proposed changes in manning, service or arrangement, with particular attention given to winches and wire rope falls.

(f) In pump rooms of older tank vessels, segregation of electric motors and pumps to comply with present practice.

(g) Installation of up-to-date CO_2 system in machinery space.

It is again emphasized that each vessel must be considered on an individual basis as to the degree that "updating" is feasible, practicable and reasonable. Full consultation with appropriate OCMIs, technical branches, and/or the Commandant (MMT) by interested shipowners, designers, and shipyards is considered highly desirable before the work specifications are finalized.

/s/ C. P. Murphy
C. P. MURPHY
Rear Admiral, U. S. Coast Guard
Chief, Office of Merchant Marine Safety

DIST (SDL NO. 81)
A: None
B: n(45); c(10); eg(3); q(6); b d p(1)
C: m(4); o(2)
D: i(2); k(1)
E: m(1); o(2)
F: None
List 112-155

32190 TREAS. CGHQ. WASH., D.C.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 440548 79